

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2108

To Be argued by assigned counsel

77-

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT TURNER 12327

Petitioner*Appellant

77-2108
75-cv-524

-V-

J.E.LAVILLE, and E.S.LAFEVRE, individually
as warden, BENJAMIN WARD, as Commissioner of Corrections
Dr.VILLALUEA, Dr.SCORES, Dr.BISSELTTE,
MRS. BRENNON, R.N., Medical Staff at
Clinton Correctional Facility

Respondent- Appellees

APPENDIX

Brief for Plaintiff - Appellant

ROBERT TURNER

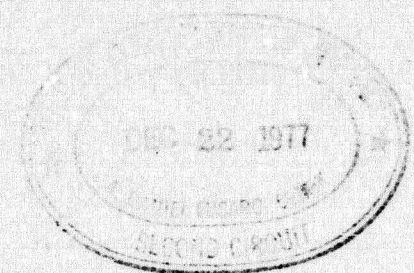
Done by: Frank Ford
Inmate Legal Assistant

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Box 6

Wallkill, NY

12589



PAGINATION AS IN ORIGINAL COPY

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TABLE OF AUTHORITIES

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TODARO V. WARD, 431 L. Supp. (1977 2nd Circuit)
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Corby v. Conboy, 457 L.1d 251
Conley v. Gibson, 73 S. Ct. 99

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT T. RNER # 12327

Petitioner-Appellant

V.

J.E. LeVALLE, and E.S. LeMAVRE, individually
as Warden, BENJAMIN WARD, as Commissioner of
Corrections, Dr. Villanueva, Dr. Scores, DR.
BISSENETTE, MRS. BRENNON, R.N., Medical Staff
at Clinton Correctional Facility.

76-CV- 524

RESPONDANT-APPELLEES.

QUESTION PRESENTED

Does failure to perform immediate "physician-ordered" treatment
raise up to a constitutional violation of the 8th, and 14th, amend-
ment.

STATEMENT OF THE CASE

This is an appeal from a judgement of the United States
District Court for the Northern District of New York (Port J.)
entered July 13th. 1977, dismissed san sponte appellants civil
rights complaint.

Occurrence and Cause of Accident

Petitioner-Appellant while participating in a sports activity, while incarcerated at Clinton Correctional Facility, slipped and fell dislocating his middle finger of his left hand. Such accident occurred on or about February 12th, 1976.

Lobby Clinic

Petitioner-Appellant, was scheduled for x-rays by Mrs. Brennan, institutional nurse, on February 13th, 1976. After reporting such accident.

X-rays Taken

Petitioner-Appellant, approximately two weeks later appeared before the x-ray technician, and x-rays were taken on February 24th, 1976, by institutional x-ray technician. However, even though Dr. Villane discovered a "chip fracture", he, Dr. Villane asserted that the fracture was of "no consequence." These x-rays were not examined until March 22nd, 1976, without any explanation given for the delay.

Petitioner-Appellant, suffering from pain ~~and~~ returned to sick-cell, at which time the institutional nurse scheduled petitioner to see Dr. Elsingher, and additional x-rays were taken on April 6th, 1976. On the 10th day of May 1976, Appellant was sent to Dr. Elsingher's office. He, the appellant was told that an operation will have to be performed to correct the appellant's dislocated finger.

Institutional Procedure

After receiving Dr. Elsingher's memo to operate immediately Dr. Scors, even after receiving such memo had to delay the operation. Since approval had to come Albany's Central Office. Such a request was forwarded to Albany on the 5th day of June 1976.

As the results of the fractured and dislocated finger, appellant returned to sick-call on the 10th day & the 11th day of June, suffering from an insurmountable amount of pain, he, the appellant requested sufficient medication, however, such was not given.

Administrative Relief

On the 10th day of June, some twentydays later, after the approval was sent to Albany, appellant lodged a grievance, one month after Dr. Eisinger ordered an immediate corrective operation. Such grievance was answered stating "Dr. Eisinger has been sick for three weeks and all his appointments have been cancelled." Appropriate Appellate steps were instituted. Since no affirmative results occurred from the grievance. On August 30th, 1976, Dr. Eisinger informed the appellant that "because of the length of time the finger will remain permanently stiff."

Dr. Saurwein's prognosis:

Until August 30th, until November 12th, 6 months and 12 days later, he, the appellant was taken to see Dr. Saurwein. After thorough examination it was determined that in order to correct the wrong of appellant's finger, a Prothesis would have to be implanted. However, such would only return about 60 to 65 percent use of that finger, providing there weren't any complications.

Operation:

Plaintiff-appellant on the 5th day of December, 1976 was admitted to Champlain Valley Physician Hospital. (Hereinafter referred to as C.V.P.H.) scheduled to be operated upon on the 6th day of December. Photographs were also taken before this operation. The operation was performed and appellant discharged on the 11th day of December 1976.

Two weeks later the stitches were removed, at which time it was discovered that there was a protrusion on the side of the finger operated on. Plaintiff was scheduled for additional x-rays.

~~Dr. S. J. Burwein~~
Dr. Burwein had allowed the amputation after consulting
with Dr. J. C. Burwein. Dr. Burwein was brought before
Dr. Burwein and told that corrective surgery will be needed since
the prosthesis had slipped out of the bone, due to lack of bone
support.

EMERGENCY CORRECTIVE SURGERY:

Appellant-Petitioner was returned to S.V.P.H.'s emergency room
for corrective surgery. Such surgery was done on the 30th day of
January 1977. Dr. Burwein then removed the old prosthesis which had
slipped due to lack of bone support, and replaced it with a new
prosthesis. As the result of inserting the new prosthesis, petitioner
finger is now, at the least, one quarter of an inch shorter than it
normally was.

At the completion of the operation, appellant was released from
S.V.P.H.'s emergency room and admitted into Clinton Correctional
Facility hospital on the same day. On the 19th day of January 1977
appellant was discharged from Clinton's institutional hospital.

The following day appellant was transferred to WALLKILL CORR.
FACILITY, that is now his place of residence.

Timely notice of appeal was filed, such was granted on August
17th, 1977. Time to perfect and submit brief was marked and dated
up until November 16th, 1977.

On November 7th, 1977, an application was made by the inmate
legal assistant for an extension of time up and until December 16th,
1977.

POINT * I

Was the District Court in error when dismissing
petitioner's civil rights complaint sub Spontea.
stating failure to raise an issue of constitutional
denial, where an insurmountable amount of pain and
suffering which was caused because of this
unreasonable delay in having a qualified physician
examine appellant immediately.

This is a PRO SE complaint against various prison officials and/or prison physicians, under civil rights statutes for failure to provide adequate and properly prescribed outside physician treatment and/or immediate medical treatment.

Estell v. Gamble, (97 S.ct. 285(1976)___U.S.___; *Todado v. Ward*, 431 U.S. 1129(1977 2nd cir.) Decision of circuit affirmed N.Y.L.J. October 14th, pg. 1, cont. on pg. 15.

It is a well re-bund rule that a failure to perform physician ordered treatment is in violation of the UNITED STATES CONSTITUTION of AMERICA, the eight amendment prohibits the dispensing of cruel and unusual punishment.

"The failure to carry out physician ordered treatment is not constitutionally tolerable."

(*Todado v. Ward*, pg. 1151)
even if such was not likely to be life threatening,
but did result in some type of discomfort.

" For example, in *Corby v. Conboy*, supra, denial of access to a physician for diagnosis and treatment of an allegedly serious nasal disorder was held to state a claim." (457 F.1d. 251 1d.)

Therefore there can be no doubt a 10 $\frac{1}{2}$ month delay in performing perscribed corrective surgery states a claim under this statute; 1983 titat 42 U.S.C.A.

Before petitioner-appellants motion was dismissed this factor should have been taken into consideration by Judge FORT. What would cause such a lengthy delay? Most surely preferable cases should not be used, because the majority of these cases were plastic surgery.

Due to the failure of the prison physicians to act immediately once physician ordered treatment was perscribed, can only amount to ~~on~~ one thing, deliberate indifference to a prisoners medical needs; e.g. *Estell v. Gamble*, supra, *Todado v. Ward* supra. Again what constitutes deliberate indifference? Such can be gleaned upon by precedent. As is factually present in this case. Consideration should be taken when reversing the District Court's opinion (FORT J.) for example failure to perform perscribed physician treatment. Dr. Stinger ordered immediate surgery. However such was not immediately performed institutional procedure delayed the operation, even after a qualified

Corrective surgery. Approval from Albany's central office was to be obtained and received by the prison physicians before the operation could be performed. Such a procedure should be discontinued, because its purpose serves only one goal, "discomfort and pain."

Since Plaintiff can prove the factual allegations respectfully alleged in this civil rights complaint. That this is a deliberate indifference to a medical need, the issuance of this motion is authorized Conley v. Gibson 78 S.Ct 39 at pg. 102 (Discrimination) Estell supra; Todado supra; (Medical treatment).

Plaintiff being an Electronic Technician, is now hindered in performing his best, since his finger is $\frac{1}{2}$ of an inch shorter. Due to the length of time it took the prison physicians to perform the outside physician ordered treatment; for a "chip fracture" obtained while competing in a sports activity while incarcerated in Clinton Correctional Facility.

Petitioner at trial will be able to prove more than negligence, Tort, or just a difference of opinion in diagnosing the injury. For example; Length of time it took to perform the physician ordered operation and the failure to perform the operation correctly, which is evident by the need of the second operation.

Jurisdictional intervention of this court is authorized by the 8th and 14th amendment of the United States Constitution, Prison physicians failed to act immediately, once outside physician treatment was ordered. Failure to perform physician ordered treatment is intolerable e.g. *Todaro v. Ward supra*, *Este L v. Gamble*, a surely deliberate indifference to a incarcerated inmates needs. Since that inmate, due to his incarceration cannot take care of his own ills. He, appellant must rely solely upon the authorities who have him confined.

Petitioner-appellant will ask that the District Court's opinion be reversed, and remand for trial be had.

RESPECTFULLY SUBMITTED:

Robert Turner

9 December 1977

MICHAEL J. WALE
Notary Public, State of New York
Qualified in Ulster County
Commission Expires March 30, 1978

Michael J. Wale

ST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	H 23	\$	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	YR.	DOCKET NUMBER
206	76-CV-524	12-28-76	3	550	1				100	0606			

PLAINTIFFS

TURNER, ROBERT

T-7880

DEFENDANTS

J.E. LaVALLEE and E.S. LE FEVRÉ,
individually as Wardens; BENJAMIN WARD,
as Commissioner of Correction; DR.
VILLANUEVA, DR. SCORES, DR. BISSENETTE,
MRS. BRENNON, R.N., Medical Staff at
Clinton Correctional Facility

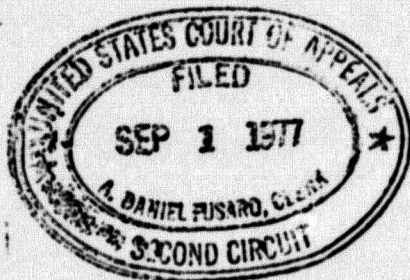
CAUSE Plaintiff alleges improper medical
treatment

76-CV-524

ATTORNEYS

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75-A-2262
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Hon. Louis J. Lefkowitz
Attorney General
State of New York
The Capitol
Albany, N.Y.



☒ CHECK
HERE
IF CASE WAS
FILED IN
FORMA

FILING FEES PAID

DATE	RECEIPT NUMBER	C.D. NUMBER

STATISTICAL CARDS

CARD	DATE MAILED
JS-5	
JS-6	

A

DATE	NR.	PROCEEDINGS
1976		
Dec. 28	1	Filed Civil Rights Complaint
Dec. 28	2	Filed Order of Judge Port (12/14/76) granting leave to proceed in
		forma pauperis and the Clerk is directed to file the papers without
		payment of fees. The Clerk is directed to issue a summons and
		complaint to the U.S. Marshal for service upon the named defendants
		without payment of fees; the Clerk shall also serve a summons and
		complaint by mail upon the Attorney Gen. of the State of New York,
		together with a copy of this Order.
Dec. 28		Issued summons -orig. & 10 copies- and delivered orig. & 9 copies to
		U. S. Marshal for service; 1 copy forwarded to the Attorney General
		State of New York by mail
1977		
Feb. 22	3	Filed Application & Order of Judge Port (2/11/77) extending time for
		State of New York to Respond
Feb. 22	4	Filed Answer of defendants
Mar. 25	5	Filed Answer of Dr. F. Bissonette
May 4	6	Filed Notice of Motion returnable May 16, 1977 at Albany, to Dismiss
		for Failure to State a Claim upon which Relief can be Granted,
		and Affidavit of Randall J. Exick in support of motion to dismiss
		for failure to State a Claim upon which relief can be granted
May 16	7	Filed Memorandum of Law by defendant Dr. Scores
May 16		Motion to dismiss, by defendant Dr. Scores-Decision Reserved.
May 20	8	Filed Application for Assignment of Counsel
May 26	9	Filed Reply to Motion to Dismiss
June 9	10	Filed Reply Affidavit of Robert Turner
June 9	11	Filed Memorandum-Decision and Order of Judge Foley (6/7/77) granting
		the motion to dismiss the complaint against defendant Dr. Scores and
		dismissing the complaint against him
July 15	12	Filed Memorandum and Order of Judge Port (7/13/77) that the application
		for the assignment of counsel is denied
Aug. 17	13	Filed Notice of Appeal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT TURNER,

Plaintiff,

-against-

J. E. LaVALLEE and E.S. LeFEVRE, individually
as Wardens; BENJAMIN WARD, as Commissioner of
Correction; DR. VILLANUEVA, DR. SCORES,
DR. BISSETTE, MRS. BRENNON, R.N., Medical
Staff at Clinton Correctional Facility,

76-CV-524

Defendants.

EDMUND PORT, Judge

Memorandum and Order

By Order dated December 14, 1976, I directed that the complaint in the above-captioned action be filed, and granted the plaintiff leave to proceed in forma pauperis. The complaint alleges that the defendants intentionally deprived the plaintiff of proper medical treatment, and seeks monetary damages of \$100,000.00. At the time the complaint was filed the plaintiff was confined in the Clinton Correctional Facility, Dannemora, New York; plaintiff is presently confined in the Wallkill Correctional Facility, Wallkill, New York 12589.

By letter dated March 27, 1977, the plaintiff inquired as to when counsel would be assigned to represent him in this matter. Before this matter was considered, the Clerk of the court requested that the file be returned to him for use in connection with a motion to dismiss on behalf of the defendant Dr. Scores that had been made before Chief Judge Foley. On May 8, 1977, the file was returned to the Clerk and on May 19, 1977, the application for assignment of counsel was sent to the Clerk for inclusion in the file. By Memorandum-Decision and Order dated June 7, 1977, Judge Foley dismissed the complaint as against the defendant Dr. Scores. The Clerk's file and the application for the assignment of counsel have now been returned to me.

In view of the substantial money demand for damages, the plaintiff should be able to retain counsel on a contingent fee basis if there is any merit to his claim. Accordingly, the application is denied at this time.

For the reasons herein, it is

ORDERED, that the application for the assignment of counsel be and the same hereby is denied at this time.


Senior United States District Judge

Dated: July 13, 1977
Auburn, New York.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT TURNER,

Plaintiff,

-against-

76-CV-524

J. E. LaVALLEE and E. S. LeFEVRE,
individually as Wardens; BENJAMIN WARD,
as Commissioner of Corrections; DR.
VILLANUEVA, DR. SCORES, DR. BISSENETTE,
MRS. BRENNON, Registered Nurse, and
MEDICAL STAFF at Clinton Correctional
Facility,

Defendants.

APPEARANCES:

OF COUNSEL:

ROBERT TURNER, Pro Se
75 A 2262
Wallkill Correctional Facility
Wallkill, New York 12589

CARTER, CONBOY, BARDWELL, CASE &
BLACKMORE
Attorney for Defendant Doctor Scores
40 Steuben Street
Albany, New York 12207

RANDALL J. EZICK

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

By order dated December 14, 1976, Judge Port of this District Court directed the filing of the pro se complaint submitted by plaintiff, an inmate of Clinton Correctional Facility, and its service upon the named defendants. Answers have been filed by the Attorney General in behalf of all defendants except Dr. Scores. Plaintiff Turner is now confined in Wallkill Correctional Facility, Wallkill, New York 12589.

A motion is now made by private attorneys in behalf of Dr. Scores to dismiss the complaint for failure to state a claim against him. The motion is supported by the attorney's affidavit and a memorandum of law. The plaintiff has filed pro se opposition to the motion to dismiss.

The complaint invokes the usual statutes for civil rights claim jurisdiction of state prisoners, 42 U.S.C. 1983, 28 U.S.C. 1341

1343(3), with the additional one of 28 U.S.C. 1331. The allegations are detailed in regard to medical attention and treatment that was accorded to plaintiff when he incurred injury to his left hand during a sports activity at Clinton on or about February 12, 1976. The plaintiff alleges X-rays of the hand were delayed from February 12, 1976 to February 24, 1976. It is alleged that when the X-rays were read by Dr. Villaneuva of the medical department at Clinton, it was his medical judgment that the plaintiff had no dislocation or major fracture, but a small "chipped fracture" of no consequence. The plaintiff alleges that he was then examined by a Dr. Eisinger, an orthopedist in Plattsburgh, who after ordering additional X-rays informed him that the middle finger of his left hand had been dislocated and immediate surgery was necessary. It is alleged that Dr. Scores interviewed plaintiff at Clinton on June 9, 1976, and informed plaintiff there was need for major surgery and would make such request to the Correctional authorities. It is alleged that he was taken to the orthopedist's office in Plattsburgh, New York, on August 30, 1976, who advised him that due to the time elapsed even a corrective operation would not return the use of the middle finger of his left hand, and that it would be permanently stiff. Plaintiff alleges that as of November 16, 1976, the date the complaint was verified, he still had not received the necessary operation.

It is established that to arise to federal constitutional stature, a claim of this kind must allege deliberate indifference to plaintiff's medical needs. See Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972). It was stated by Justice Marshal in Estelle v. Gamble, ____ U.S. ____, 97 S.Ct. 285 (November 30, 1976), 45 U.S. Law Week 4023, that a decision by a doctor not to order an X-ray, or additional diagnostic techniques or forms of treatment, at most, is medical malpractice and the proper forum is a State court.

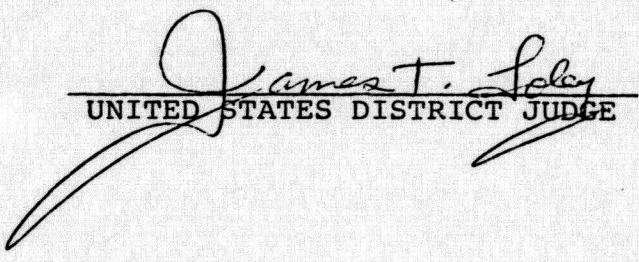
In this instance, the allegation against Dr. Scores details a limited role on his part that, in my judgment, does not rise to the level of a viable constitutional claim against him upon which monetary relief could be granted.

The motion to dismiss the complaint against defendant Dr. Scores is granted and the complaint is dismissed against him.

It is so Ordered.

Dated: June 7, 1977

Albany, New York


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT TURNER,

Plaintiff,

vs.

J.E. LA VALLEE and E.S. LE FEVRE, individually as
Wardens; BENJAMIN WARD, as Commissioner of Correction;
DR. VILLANUEVA, DR. SCORES, DR. BISSENETTE, MRS. BRENNON
R.N., Medical Staff at Clinton Correctional Facility,

76-CV-

76-CV- 524

Defendants.

EDMUND PORT, Judge

O R D E R

The Clerk of the court has sent to me for my consideration a civil rights complaint from the above captioned state inmate, who is presently confined in the Clinton Correctional Facility, Dannemora, New York. The letter dated November 18, 1976 accompanying the complaint states that the complaint is a "supplement to [the inmate's] letter application of June 17, 1976, which was denied." By Memorandum-Decision and Order dated July 1, 1976, I denied and dismissed a one-page letter-application of the inmate's, which alleged improper medical treatment.

Rather than treating the instant complaint, sworn to November 16, 1976, and plaintiff's letter of November 18, 1976, as an application for reconsideration of my earlier decision of July 1, 1976, record keeping purposes will be better served by treating it as a new proceeding. Filing is hereby ordered.

¹ See, e.g., Lewis v. New York, docket no. 76-2061 (2d Cir. Oct. 27, 1976); and Mawhinney v. Henderson, docket no. 76-2028 (2d Cir. Aug. 30, 1976).

Accordingly, the plaintiff is granted leave to proceed in forma pauperis and the Clerk is directed to file the papers herein without the payment of the prescribed fees. The Clerk is directed to issue a summons and complaint to the United States Marshal for service upon the named defendants, without the payment of fees; the Clerk shall also serve a summons and complaint by mail upon the Attorney General of the State of New York, together with a copy of this Order.

It is So Ordered.

Senior United States District Judge

Dated: December 14, 1976
Auburn, New York.

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